

Supreme Court U.S.
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MICHAEL RODAK, JR., CLERK

No. 79-309

In the Supreme Court of the United States
OCTOBER TERM, 1979

ANDREW RENFRO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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**MEMORANDUM FOR THE UNITED STATES
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Petitioner seeks review of his conviction for failure to file an income tax return and for attempted income tax evasion on the grounds that the trial judge's instructions were erroneous, that the prosecutor's closing argument was prejudicial, and that signatures appearing on certain business records admitted into evidence by stipulation were not separately authenticated.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of failing to file an income tax return for 1971, in violation of 26 U.S.C. 7203, and of attempted income tax evasion for 1972, in violation of 26 U.S.C. 7201 (R. 94a).¹

¹"R." and "Supp. R." respectively refer to petitioner's record appendix and the supplemental appendix in the court of appeals. "Tr." refers to the trial transcript.

The district court sentenced him to concurrent one year and four year terms of imprisonment (R. 3a). The court of appeals affirmed (Pet. App. 17-25).

At trial, the government proceeded by the net worth plus non-deductible expenditures method of proof. It established that petitioner had an adjusted gross income of more than \$18,000 for 1971 and \$60,000 for 1972 (Supp. R. 240). The government also produced evidence that showed, *inter alia*, that during the prosecution years, petitioner purchased real estate costing approximately \$58,000 (Supp. R. 152-153, 184-186, 222-226), purchased a Cadillac automobile and a Honda motorcycle (Supp. R. 43-49, 228-233), made substantial expenditures for furniture and household appliances (Supp. R. 195-206), and increased his cash on hand in various bank accounts from \$41.80 in 1970 to \$6,466.79 in 1972 (Supp. R. 1-18). The government also negated leads supplied by petitioner, including the assertion that petitioner's wife could have provided funds for the expenditures (Supp. R. 12, 64, 71, 99, 129-136).

1. Petitioner contends (Pet. 6-8) that the district court improperly shifted the burden of proof to him by charging the jury as follows: "if it appears from the evidence in the case the defendant has failed to provide explanation as to the source or sources of any increases in his net worth, then the jury may consider such failure as one of the circumstances in evidence in the case." Petitioner further argues (Pet. 9-11) that the court's instruction concerning the significance that the jury may attach to his explanation for his sources of income similarly shifted the burden of proof to him.

But as the court of appeals correctly observed, "[n]o objections were made, by counsel for the appellant, to any of these alleged errors during the trial" (Pet. App. 18) and

none of them constituted "plain error" (Pet. App. 18-20). There is accordingly no basis for reversal. *Lopez v. United States*, 373 U.S. 427, 436-437 (1963); *United States v. Crum*, 529 F. 2d 1380 (9th Cir. 1976); Fed. R. Crim. P. 30, 52(b).

At all events, the instructions as a whole show that the trial court did not advise the jury that petitioner had the burden to explain his income. To the contrary, the court told the jury that petitioner's explanation, or the absence of one, was a matter of evidence that should be weighed with all the other evidence in the case. Such an instruction is entirely proper in a net worth case. See *Holland v. United States*, 348 U.S. 121, 132-140 (1954).

2. Petitioner also argues (Pet. 11) that the statement, in both the prosecutor's closing argument and the court's instructions, that taxes may be levied on income from legal or illegal sources, deprived him of a fair trial. However, this statement accurately reflects the law (see *James v. United States*, 366 U.S. 213 (1961)) and, as the court of appeals noted (Pet. App. 20), "[i]t is possible that the jury might have drawn some inference from the evidence that there was illegal income."

3. Finally, petitioner contends (Pet. 12-16) that business records admitted into evidence as authentic following stipulation of counsel were incompetent because the signatures appearing thereon were not separately authenticated as belonging to petitioner. But once these records were identified as bona fide business records made and kept in the regular course of business, authentication of the signatures was not a prerequisite to their admissibility. *United States v. Saputski*, 496 F. 2d 140, 142 (9th Cir. 1974). Moreover, in its instructions the trial court clearly indicated that the ultimate question of authenticity and weight belonged to the jury (Tr. 465-466).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

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